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Panel Deplores Difficulty in Prosecuting U.S. Leaks Because Information Is Secret

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WASHINGTON—The government's refusal to reveal secrets in criminal trials has made it impossible to convict anyone for leaking classified information to the press and has hampered prosecution of crimes ranging from espionage to murder, the Senate Intelligence Committee reported Tuesday.

The panel said defendants were often able to avoid criminal prosecution by demanding that the government release secret information concerning their cases, a procedure the committee called "graymail," a legal form of blackmail.

Sen. Joseph R. Biden Jr. (D-Del.), chairman of the committee's secrecy and disclosure subcommittee, said the report revealed "a shocking phenomenon which undermines the enforcement of all laws relating to intelligence operations. Simply stated, the government refrains from prosecuting certain lawbreakers due to the fear that sensitive information would be revealed in the course of a trial."

The report, prepared by Biden's subcommittee and endorsed by the full committee, recommended that courts be required to determine in secret pretrial hearings whether documents requested by the defense were relevant. It also suggested that government agencies increase their use of secret administrative information. Thus, the proceedings to punish employees who are guilty of leaking secret information would not become public.

But the committee conceded that its recommendations would not solve the problem.

"The committee recognizes that if this program were adopted in toto there would still be circumstances where some leaks would go unpunished and some prosecutions (would be) subject to 'graymail' but perhaps that is the price we must pay for the constitutional protections of a free press and a right to public trial," the committee said.

The panel considered but rejected as too drastic and probably unconstitutional the only two steps it said might be fully effective in dealing with the problem: establishment of secret trials in national security cases, and passage of a law making it a

crime to leak information regardless of whether national security suffers.

"Only the establishment of a secret trial system for these kinds of cases would resolve the problem described in this report—not in our opinion a very desirable or likely development," the report said.

"It would be immensely easier to prosecute leaks and espionage if all that had to be proven was that the defendant had passed classified information to unauthorized persons—essentially the rule under the (British) Official Secrets Act," the committee said.

But it concluded, "Most members of the committee have serious doubts as to whether even a radical restructuring of the espionage law along the lines of the British Official Secrets act could have an appreciable impact on leaks. The committee is unanimous in the view that countless practical, legal and political differences lie in the path of such an undertaking."

Although the committee admitted it was unable to find an acceptable solution to the problem, it was specific in describing the difficulties that law enforcement agencies face in attempting to prosecute cases involving national secrets.

Under federal laws and legal rulings, defendants in a criminal trial are entitled to obtain all the information in the hands of the government that affects their case. Secrets are almost always involved in leak or espionage cases, and the committee found that

secrets are also often raised in seemingly unrelated criminal cases.

"Problems created by classified information have hampered prosecutions including perjury, extortion, bribery, narcotics violations and possibly even one murder case," the report said.

In both leak and espionage cases, the committee said, the government has been reluctant to act because the simple fact of prosecution tends to vouch for the accuracy of the information involved, in effect confirming intelligence that otherwise might be doubted by a foreign country.

"To date, we have been unable to identify a single successful prosecution of an individual who leaked information to a publication," the report said.

Espionage cases—more serious because they involve the passing of secrets directly to foreign governments—have been prosecuted, that report said, but "the decision in the past was often not to prosecute."